

**Defazio v A.W. Chesterton**

2011 NY Slip Op 31212(U)

May 2, 2011

Supreme Court, New York County

Docket Number: 127988/02

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER  
*Justice*

PART 30

LOUISE DEFAZIO, as Executrix for the Estate of,  
SAMUEL DEFAZIO, Deceased,

Plaintiff,

- v -

A.W. CHESTERTON, et al.,

Defendants.

INDEX NO. 127988/02

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Upon the foregoing papers, It is ordered that this motion is decided  
in accordance with the memorandum decision dated May 2, 2011

**FILED**

MAY 06 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5-2-11

  
SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

----- X  
LOUISE DEFAZIO, as Executrix for the Estate of  
SAMUEL DEFAZIO, Deceased,

Index No. 127988/02  
Motion Seq. 001

Plaintiff,

-against-

A.W. CHESTERTON, et al.,

Defendants.

----- X  
SHERRY KLEIN HEITLER, J.:

DECISION AND ORDER

**FILED**

MAY 06 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Crane Co's motion pursuant to CPLR § 327 to dismiss this asbestos personal injury action on the grounds of forum non-conveniens is denied due to laches and inexcusable delay.

This action was commenced by Louise Defazio, as Executrix for the Estate of Samuel Defazio, to recover for personal injuries allegedly caused by Samuel Defazio's exposure to asbestos-containing products. Mr. Defazio died on March 30, 2001 at the age of 55 as a result of malignant mesothelioma. This action was commenced in December of 2002 and in November of 2008 the case was assigned to be included in the February 2010 FIFO Cluster, a note of issue having been filed without objection. Plaintiff's first amended answers to defendant's fourth set of interrogatories and request for production of documents was served on May 21, 2009. Defendant filed this motion on January 21, 2011 and plaintiff responded on March 9, 2011. Defendant presented a reply on March 24, 2011 and the motion was submitted on March 29, 2011.

The deposition of Robert F. Tortorete, Mr. Defazio's former co-worker, was taken on

October 21, 2009 in New York, and a copy of his deposition transcript is submitted as defendant's exhibit C. Mr. Tortorete's deposition focused on Mr. Defazio's alleged exposure to asbestos from 1961 to 1964 during his employment with Defazio Plumbing & Heating, a business owned and operated by Mr. DeFazio's father. Mr. Tortorete testified that Mr. Defazio was exposed to asbestos in connection with work he performed on valves, pipes, pumps, and automobiles at various sites in the Sharpsburg and Etna, Pennsylvania areas.

On this motion Crane Co. asserts that it is entitled to dismissal of the action pursuant to CPLR § 327 because allegedly the evidence shows that Mr. Defazio was only exposed to asbestos in Pennsylvania. In opposition, plaintiff submits that Crane Co.'s motion should be denied due to laches and inexcusable delay.

The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that "in the interest of substantial justice the action should be heard in another forum." CPLR § 327. The doctrine is "flexible," and requires the balancing of many factors bearing on the particular case. *National Bank & Trust Co. v Banco de Vizcaya, S. A.*, 72 NY2d 1005, 1007 [1988]. These factors include: (i) the residency of the parties; (ii) the jurisdiction in which the underlying transaction occurred; (iii) the location of the relevant documents and witnesses; (iv) the availability of a suitable forum; and (v) the interest of the alternative forum in deciding the issues. *See Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984]. No one factor is controlling. Indeed, "the great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case." *Id.* at 479.

Dismissal of an action for forum non-conveniens may be precluded by laches and

inexcusable delay. As one example, in *Corines v Dobson*, 135 AD2d 390 [1st Dept 1987], the Appellate Division, First Department held that the defendant driver of an automobile was not entitled to forum non-conveniens dismissal of an action brought by several passengers injured in an accident on a Caribbean island, notwithstanding the defendant's contentions that several witnesses resided on the island and foreign standards of conduct would govern the action. First and foremost, the court relied on the fact that the defendant did not make its motion for almost eighteen months after discovery began, pretrial activities had taken place, and the note of issue and certificate of readiness had been filed without objection. Similarly, in *Kefalas v Kontogiannis*, 44 AD3d 624 [2d Dept 2007], the doctrine of laches barred defendants' claim that the trial court was an improper forum for plaintiff's breach of contract action where defendants had participated in the action for more than two years through lengthy discovery and the filing of a note of issue. And in *Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin, P.C. v Richardson*, 231 AD2d 1 [1st Dept 1997], the court denied a client's motion to dismiss his former attorneys' action to recover fees on the ground that New Jersey provided a more convenient forum, where two years had passed since commencement of the action and after the client had signed an agreement to arbitrate in New York.

As in *Corines*, *Kefalas*, and *Todtman*, *supra*, laches bars Crane Co.'s claims. Based on Mr. Tortorete's deposition, which was taken in October of 2009, Crane Co. had more than enough information with which to timely bring this motion. In October of 2010 the Special Master notified the parties whose cases were included in the February 2010 FIFO Cluster (including this one) that they would be assigned to trial judges. The Special Master instructed the defendants that they were to provide her with any objections that might render a case not

trial-ready. (Plaintiff's exhibit E). Again, Crane Co. made no objection as to forum and this action was transferred to the Hon. Martin Shulman for trial. Still, Crane Co. waited until January of 2011 to file this motion -- three years after the note of issue was filed in this case and it was assigned to be included in the February 2010 FIFO Cluster; 23 months after plaintiff served her first amended answers to defendant's interrogatories, 18 months after Mr. Tortorete's deposition was taken; and almost 6 months following the transfer of this case for trial to Judge Shulman. Clearly Crane Co. sat on any rights it may have had to remove this action to another forum. *Cf. Corines, supra.*

Assuming there is a question of the suitability of another appropriate forum in this case,<sup>1</sup> at this stage of the proceedings New York is as suitable a forum as any. Most of the corporate defendants in this case were served with process in New York through their designated agents. Plaintiff's interrogatory responses show that Mr. Defazio was a one time New York resident during the relevant period and that he may have been exposed to asbestos in New York in connection with his employment as a maintenance worker from 1966-1973. While defendant suggests that Pennsylvania was the more appropriate forum in which to bring this action, this case is now almost ten years old. Both plaintiff and defendant have already spent a great deal of time and resources in furtherance of this matter in this jurisdiction. To dismiss the action now only to recommence it again in another forum under a new set of rules would be too burdensome.

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<sup>1</sup> Mr. Tortorete's deposition focused on those alleged incidents of Mr. Defazio's exposure which took place in Pennsylvania from 1961 to 1964. At the time of his death, Mr. Defazio was a resident of New Hampshire. His executrix continues to reside there. Crane Co., which maintains its principal place of business in Connecticut, is incorporated in Delaware. Mr. Defazio's medical records are purportedly located in Ohio, New Hampshire, and Massachusetts.

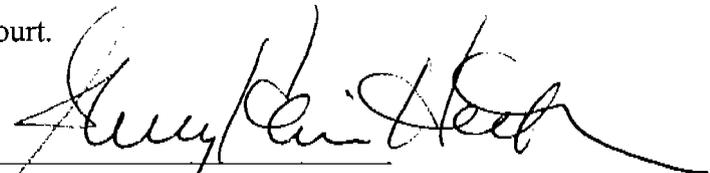
In light of the foregoing, this court finds that the inexcusable delay of the defendant in moving for the relief requested militates in favor of retaining jurisdiction in New York.

Accordingly, it is hereby

ORDERED that Crane Co.'s motion to dismiss this action on the ground that New York is an inconvenient forum is denied.

This constitutes the decision and order of the court.

DATED: May 2, 2011

  
SHERRY KLEEN HEITLER  
J.S.C.

**FILED**

**MAY 06 2011**

NEW YORK  
COUNTY CLERK'S OFFICE